

FILE COPY

Supreme Court, U. S.  
FILED

MAY 31 1972

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1971

No. 71-1082

REUBIN O'D ASKEW, ET AL.,

*Appellants,*

v.

THE AMERICAN WATERWAYS  
OPERATORS, INC., ET AL.,

*Appellees.*

On Appeal from the United States District Court  
for the Middle District of Florida

BRIEF OF THE COMMONWEALTH OF VIRGINIA,  
AMICUS CURIAE, ON BEHALF OF THE APPELLANTS

ANDREW P. MILLER  
*Attorney General*

C. TABOR CRONK  
*Assistant Attorney General*

Supreme Court Building  
1101 East Broad Street  
Richmond, Virginia 23219  
*Counsel for the Commonwealth  
of Virginia, Amicus Curiae*

# Supreme Court of the United States

October Term, 1971

---

No. 71-1082

---

REUBIN O'D ASKEW, ET AL.,

*Appellants,*

v.

THE AMERICAN WATERWAYS  
OPERATORS, INC., ET AL.,

*Appellees.*

---

On Appeal from the United States District Court  
for the Middle District of Florida

---

BRIEF OF THE COMMONWEALTH OF VIRGINIA,  
AMICUS CURIAE, ON BEHALF OF THE APPELLANTS

---

## INTEREST OF THE COMMONWEALTH

Based on United States Coast and Geodetic Survey maps, the Commonwealth of Virginia estimates that it has at least 5,432 miles of shoreline along the Atlantic Ocean, the Chesapeake Bay and its tidal estuaries and rivers. Defining coastal wetlands as those areas between mean high water and mean low water and those areas in which certain

species of plants are characteristically found, the Virginia Institute of Marine Science has estimated that Virginia has some 392,955 acres of coastal wetlands of which some 176,766 acres are classified as marsh. Based on ultimate consumer prices, it has been estimated that each acre of marsh contributes \$525 yearly to the economy of the Commonwealth in the form of fin and shellfish. *Coastal Wetlands of Virginia Interim Report Summary and Recommendations*, Virginia Institute of Marine Science, pp. 2-3, 11 (1969). Obviously, this estimate represents but a fraction of the direct and indirect value of these wetlands to the Commonwealth and its people.

#### ARGUMENT

On April 10, 1972, the Governor of Virginia approved legislation authorizing the adoption of local wetland zoning ordinances to protect the wetlands from misuse. On the face of this legislation, the General Assembly of Virginia declared that:

"The Commonwealth of Virginia hereby recognizes the unique character of the wetlands, an irreplaceable natural resource which, in its natural state, is essential to the ecological systems of the tidal rivers, bays and estuaries of the Commonwealth. This resource is essential for the production of marine and inland wildlife, waterfowl, finfish, shellfish and flora; is valuable as a protective barrier against floods, tidal storms and erosion of the shores and soil within the Commonwealth; is important for the absorption of silt and of pollutants; and is important for recreational and aesthetic enjoyment of the people for the promotion of tourism, navigation and commerce.

"Continued destruction of Virginia's coastal wetlands will greatly contribute to the pollution of the

Commonwealth's rivers, bays and estuaries; will diminish the abundance of Virginia's marine and inland animals and waterfowl, finfish, shellfish and flora as sources of food, employment and recreation for the people of Virginia; will increase costs and hazards associated with floods and tidal storms; and will accelerate erosion and the loss of lands productive to the economy and the well-being of our citizens." Chapter 711, Acts of Assembly of 1972.

Virginia is fortunate in that it has thus far not suffered what could be termed a major oil spill in its coastal waters. Nevertheless, the General Assembly has recognized the potential for disaster on our shores from sea borne petroleum products as well as their gradual debasement by offal cast from vessels. Sections 62.1-44.34 and 62.1-195 of the Code of Virginia (1950), as amended, dealing with the discharge of petroleum products in Virginia waters are reproduced in an appendix hereto.

Having recognized the value of our shores, and whereas we have acted to secure them from destruction, we share the anxiety of the State of Georgia evidenced by its Brief Amicus Curiae in Support of the Appellants. Inasmuch as that Brief mirrors the position of the Commonwealth of Virginia in this matter, we fully adopt that Brief as that of the Commonwealth and urge the Court to reverse the judgment of the three-judge district court on the ground that the judgment of that court is not consonant with prior decisions of this Court and erroneously relies on federal legislation which is facially unconstitutional or is unconstitutional as applied.

**CONCLUSION**

The judgment of the three-judge district court is erroneous for the reasons advanced in the Brief of the State of Georgia, Amicus Curiae, in Support of the Appellants, fully adopted herein, and ought to be reversed.

Respectfully submitted,

ANDREW P. MILLER  
*Attorney General*

C. TABOR CRONK  
*Assistant Attorney General*

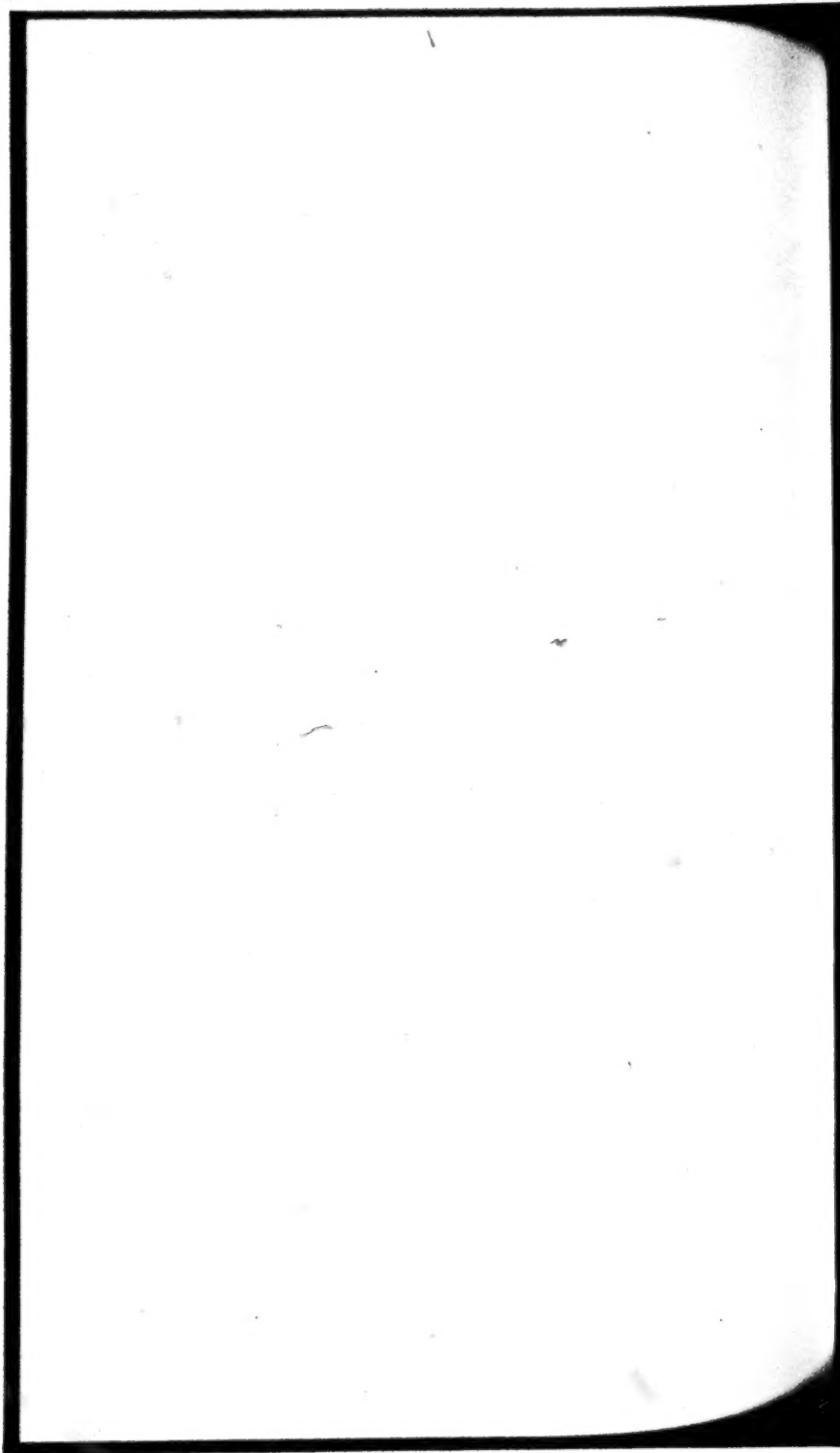
Supreme Court Building  
1101 East Broad Street  
Richmond, Virginia 23219  
*Counsel for the Commonwealth  
of Virginia, Amicus Curiae*

**CERTIFICATE OF SERVICE**

I, the undersigned member of the bar of this Court, certify that on the 30th day of May, 1972, I mailed by air-mail, postage prepaid, three copies of the foregoing Brief to Ervin, Pennington, Varn & Jacobs, Attorneys at Law, P. O. Box 1170, Tallahassee, Florida 32302; to Kurz, Toole, Taylor, Moseley & Gabel, Attorneys at Law, Suite 1014 Barnett Bank Building, 112 West Adam Street, Jacksonville, Florida 32202; to Fowler, White, Gillen, Humkey, Kinney & Boggs, Attorneys at Law, P. O. Box 1438, Tampa, Florida 33601; to Haight, Gardner, Poor & Havens, 80 Broad Street, New York, New York 10004; to Healy & Baillie, Attorneys at Law, 29 Broadway, New York, New York 10006, counsel for Appellees; and to the Honorable Robert L. Shevin, Attorney General of Florida,

Department of Legal Affairs, The Capitol, Tallahassee, Florida, counsel for Appellants. All parties required to be served have been served.

C. TABOR CRONK  
*Assistant Attorney General*



BLEED THROUGH POOR COPY

§ 62.1-44.34. *Discharge of petroleum products into navigable waters prohibited; abatement of pollution.*—(1) No owner or operator of any vessel on the navigable waters of this State shall cause or permit the discharge of any petroleum product into such waters in an amount sufficient to cause damage to aquatic life therein or to the land or beaches adjacent thereto.

(2) The State Water Control Board may proceed against any person violating subsection (1) of this section as hereinabove provided in this chapter, and in addition may require such person to take such action as may be required to abate any pollution so caused.

(3) In the event any such discharge occurs, and it cannot be determined immediately what vessel or vessels were responsible therefor, the State Water Control Board may, with the consent of the Governor, take such action as is necessary to abate such pollution, including the engagement of contractors or other persons competent to eliminate the pollution. The cost of such abatement shall be collectible from the person causing or permitting such discharge, if his identity can be determined. If it is not possible to determine the identity of such person, the cost of the abatement of such pollution shall be paid from the general fund of the State treasury.

§ 62.1-195. *Discharge of oil in certain waters.*—(1) The following words, as used in this section, shall have the following meanings, unless the context otherwise requires:

- (a) "*Oil*" means any petroleum product or derivative.
- (b) "*Person*" means any individual association, firm or corporation.
- (c) "*Waters*" means navigable tidal waters.



App. 2

(d) "*Vessel*" means any boat, ship, barge, or other floating conveyance, however powered.

(2) Except in case of emergency imperiling life or property, or unavoidable accident, collision or stranding, and except as otherwise permitted by any lawful regulation, it shall be unlawful for any person to discharge, or suffer, or permit the discharge from any vessel of oil by any method, means or manner into, upon or under the navigable tidal waters of the State. Pursuant to such regulations which may be prescribed under federal laws or regulations, any lawful body of the State having jurisdiction of the ports of this State is authorized and empowered to regulate the discharge of oil from vessels in such quantities, under such conditions and at such times and places as in its opinion will not be deleterious to health or seafood, or a menace to navigation, or dangerous to persons or property engaged in commerce on such waters, and for the loading, handling and unloading of oil. Such body may cooperate with any agency of the federal government in the enforcement of this section.

(3) Any person who violates paragraph (2) or any regulation prescribed in pursuance thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two thousand five hundred dollars and not less than five hundred dollars, or by imprisonment not exceeding one year and not less than thirty days, or by both such fine and imprisonment, for each offense. And any vessel (other than one owned and operated by the State of Virginia or the United States) from which oil is discharged in violation of paragraph (2) or any regulation prescribed in pursuance thereof, shall be liable for the

### App. 3

pecuniary penalty specified in this section and the penalty shall constitute a lien on such vessel.

The provisions of this section shall be deemed to supplement and not to replace the provisions of § 62.1-194.

(4) In addition to the foregoing penalties for the violation of this law, the vessel from which the oil is discharged shall be liable to the county or city in which the oil is discharged in violation of paragraph (2) for liquidated damages in the amount of one dollar per gallon of oil so discharged; provided, however that the total amount of liquidated damages shall not exceed the sum of fifteen thousand dollars for each violation. Such damages may be collected by an action in admiralty brought in an appropriate State or federal court by the attorney for the Commonwealth of such county or city for the benefit of such county or city in the name of the Commonwealth. Such sums as may be assessed against such vessel shall be paid into court or collected by the attorney for the Commonwealth and forwarded to the treasurer of the county or city entitled to such damages to be used for general county or city purposes.

Proof that oil was discharged from the vessel and a reasonable estimate of the amount so discharged shall make a prima facie case against the vessel and the burden shall be upon the vessel to establish that the discharge was permissible.